

## Central Law Journal

St. Louis, March 5, 1926

### LIABILITY OF HUSBAND FOR INJURY TO WIFE DUE TO HUSBAND FALLING ASLEEP WHILE DRIVING AUTOMOBILE

In the case of *Bushnell v. Bushnell*, 131 Atlantic 432, decided by the Supreme Court of Errors of Connecticut, it appeared that the plaintiff and defendant, husband and wife, were riding together in an automobile, which he was driving. The plaintiff had been asleep for some minutes at the time of the accident, and the defendant fell asleep momentarily, with the result that the automobile ran off the highway and struck a tree at the side of the road, with consequent injury to the plaintiff. It was contended, first, that a wife cannot maintain an action against her husband to recover damages growing out of his negligence; secondly, that the parties were engaged in a joint enterprise at the time of the injury; thirdly, that the defendant could not be held to have been negligent because the accident was due to the fact that he momentarily dropped off to sleep while operating the automobile; and, fourthly, that the plaintiff was guilty of contributory negligence.

There was a judgment in the lower court in favor of the plaintiff for \$2,000.00, which was sustained on appeal provided a remittitur of \$300.00 was made. The court held that it was of no consequence whether or not the plaintiff and defendant were engaged in a joint enterprise, as the driver of the vehicle engaged in a joint enterprise is liable for his negligence to an associate who is injured thereby. The fact that the defendant fell asleep was sufficient to submit the question of his negligence in so doing to the jury.

On the question of the defendant's neg-

ligence, we quote from the opinion of the court as follows:

"The trial court submitted to the jury the question whether, in view of the circumstances preceding and surrounding the accident, the fact that the defendant momentarily fell asleep constituted negligence on his part. There is surprisingly little authoritative discussion in decisions or text-works as to the relation of sleep to the doctrine of negligence, although in a number of cases it seems to have been assumed that it constitutes contributory negligence for one in a position of peril to become incapacitated by sleep from protecting himself from harm. . . .

"In such a case, the question must be, Was the defendant negligent in permitting himself to fall asleep? *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 284, 12 So. 276. The defendant argues that, granted that premise, then he cannot be charged with negligence because no man can tell when sleep will fall upon him. It is probably true that one cannot ordinarily fix with certainty upon the precise moment when he lapses into unconsciousness, but it is not true that ordinarily sleep comes unheralded. Purves Stewart, in his 'Diagnosis of Nervous Diseases' (3d. Ed.), p. 423, thus describes the chief phenomena of ordinary healthy sleep:

"Firstly, there is diminution and then loss of conscious recognition of ordinary stimuli, such as would ordinarily attract our attention, whether these stimuli be derived from the outer world or from within the sleeper's own organism. There is also, as consciousness is becoming blunted, a characteristic and indescribable sense of well-being. Voluntary movements become languid and ultimately cease and the muscles of the limbs relax. Meanwhile there develops double ptosis or drooping of the eyelids; the pupils contract; the respiratory movements become slower and deeper, the pulse is slowed, the cutaneous vessels dilate to a slight extent and the general temperature of the body falls, whilst many

processes of metabolism, such as those of digestion and of certain secretions are retarded.'

"Particularly would this be true where the onset of sleep is due to the prolonged action of a uniform excitant, associated with little voluntary movement and a large degree of muscular relaxation, acting upon one who has become more or less fatigued and is sitting down in a warm atmosphere. 66 American Journal of Physiology, pp. 83, 84. Sleep in such a situation does not come upon one unawares, and, by watching for indications of its approach or heeding circumstances, which are likely to bring it about, one may either ward it off or cease an activity capable of danger to himself or to others. There are few ordinary agencies so fraught with danger to life and property as an automobile proceeding upon the highway freed of the direction of a conscious mind, and, because this is so, reasonable care to avoid such a danger requires very great care. Mulligan v. New Britain, 69 Conn. 96, 102, 36 A. 1005; Brown v. New Haven Taxicab Co., 93 Conn. 251, 257, 105 A. 706; Walters v. Hansen, 99 Conn. 680, 683, 122 A. 564; Tower v. Camp, 103 Conn. 41, 46, 130 A. 86.

"In any ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent. It lies within his own control to keep awake or cease from driving. And so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a *prima facie* case, and sufficient for a recovery, if no circumstances tending to excuse or justify his conduct are proven. Carlson v. Connecticut Co., 85 Conn. 724, 112 A. 646; Sliwowski v. New York, N. H. & H. R. Co., 94 Conn. 303, 309, 108 A. 805; 1 Shearman & Redfield, Negligence, § 58a et seq.; posthumous paper of Ezra Ripley Thayer, 29 Harvard Law Review, 807. If such circumstances are claimed to have been proven, it then becomes a question of fact whether or not

the driver was negligent; and, in determining that issue, all the relevant circumstances are to be considered, including the fact that ordinarily sleep does not come upon one without warning of its approach. 5 Wigmore, Evidence (2d Ed.) § 2491. The trial court was right in leaving the issue to the jury as one of fact, but it might properly have gone farther and called attention to the last-mentioned feature of the case."

As to the plaintiff's contributory negligence, the Court said:

"It is agreed that the plaintiff was asleep at the time of the accident and had been for some time before. The defendant claims that the evidence establishes these further facts: The defendant was in his sixty-first year. He and the plaintiff, with their son, left Thompsonville to drive to Providence at 4:30 in the morning, and the son had driven the automobile until that destination was reached. The plaintiff and defendant soon set out on their return; the latter driving. They had planned to stop at Danielson for lunch, but, finding no acceptable place to procure it, drove on. The day was a warm, drowsy spring day. The sun at times shone into the automobile, particularly on the driver's side. The car was a closed car and all the windows were shut except that next the driver's seat. The road was smooth and dry, and the traffic light. The engine of the car had a particularly musical hum, and the plaintiff felt drowsy and sleepy; in fact she fell asleep before noon, and continued asleep until the accident, which took place about 12:30. The defendant was an experienced driver, had never before fallen asleep while driving, had seldom felt sleepy, and on this occasion had no warning of sleepiness and felt no drowsiness. Accepting these as the proven facts, they do not show that as a matter of law the plaintiff was guilty of contributory negligence, for they fall far short of establishing any obligation upon her part to exercise an oversight as to the way in which the automobile was being operated, to keep a lookout for impending

danger, or to watch against sleepiness on the part of her husband. *Clarke v. Connecticut Co.*, 83 Conn. 219, 221, 76 A. 523; *Weidlich v. New York, N. H. & H. R. Co.*, 93 Conn., 438, 441, 106 A. 323; *Sampson v. Wilson*, 89 Conn. 707, 708, 96 A. 163; *Duffy v. Bishop Co.*, 99 Conn. 573, 578, 122 A. 121. These being the only ways in which she might have been instrumental in preventing the accident, she cannot, as matter of law, be charged with any breach of duty which materially contributed to bring it about. The issue was rightly submitted to the jury by the trial judge as one of fact, under adequate and proper instructions."

#### NOTES OF IMPORTANT DECISIONS

**LIABILITY OF CITY FOR NEGLIGENCE OF AGENT CAUSING INJURY BY WILD ANIMAL IN ZOO.**—The Supreme Court of Mississippi, in *Byrnes v. City of Jackson*, 105 So. 861, holds that a city maintaining a zoo in a public park, keeping therein wild and dangerous animals, is responsible in damages for the negligence of its officers and agents by which persons visiting the park are injured by such wild animals.

In part the Court said:

"It seems to us that the rule making it the duty of the city to exercise reasonable care to make its parks reasonably safe places for people to resort to, and making the city liable for negligence, is the better rule. Certainly it would not be the rule of wisdom to permit a city to fill its parks with dangerous and ferocious animals without having it exercise a high degree of care, if not absolute liability in keeping them safely confined. It is insisted by the appellee that the zoo is a part of the education of the public, and that educating the people is a governmental function, and that no liability exists against the city for negligence in this regard.

"It cannot be the law that the city can place in its parks ferocious and dangerous animals by which the safety, and even the lives, of the public would be endangered without requiring the city to keep such animals securely confined. As a general rule persons having animals wild by nature and of ferocious disposition are required to keep such animals confined absolutely, or pay for any damage sustained by a failure so to do. This court held in *Phillips v. Garner*,

106 Miss. 828, 64 So. 735, 52 L. R. A. (N. S.) 377, that persons possessing such animals are under the absolute duty to keep them safely confined. The same rule was recognized in *Ammons v. Kellogg*, 137 Miss. 551, 102 So. 562.

"While the city may be maintaining the zoo for educational purposes, it is not such an education as the city is required by law to furnish to the public. There is no mandatory duty upon the city to either maintain a park or to keep a zoo therein. The right is permissive rather than mandatory, and we think when the city undertakes to maintain a zoo, and to keep therein dangerous and ferocious animals, it must be held to the strict duty of keeping them safely, and that it was negligence on the part of the keeper to chain the bear in the present case in the open park with a chain 6 or 10 feet in length tied to the bear, giving it such a range, and therefore capacity to do harm, of the circumference of a circle of which this chain is the radius."

**FUMES FROM A STILL COMING FROM A PRIVATE RESIDENCE DO NOT JUSTIFY A SEARCH WARRANT.**—In the case of *Staker v. United States* (C. C. A., 6th Cir.), 5 F. (2d) 312, it appeared from the testimony that the prohibition agents, while passing in Maysville, Ky., along the public street or highway and past defendant's house, which was used and occupied by him as his dwelling, detected the odor of cooking mash emanating from the basement, made affidavit before the police judge and secured a warrant to search the dwelling house; in the affidavit it was alleged that the affiant is a general prohibition officer, and that he has smelled the fumes from a still making intoxicating liquors, and that he has reasonable grounds to believe and does believe that intoxicating liquors are being sold, manufactured, disposed of, or illegally possessed in a house, building, and premises owned or controlled by John H. Staker and described and located as follows: 1417 Forest avenue, Maysville, Ky., one-story frame. A 12-gallon still was found in operation in the cellar, and also some moonshine whisky and wine. There was a door leading into the cellar from the outside, but as this was padlocked the cellar could not be entered without going into the house.

Holding that the search warrant was improperly issued, the Court said:

"The search warrant must be deemed invalid, because there were no allegations of fact in the affidavit upon which it was issued which would tend to show that the dwelling house had ever been used for the unlawful sale of intoxicating

liquor, or that any part thereof was used for some business purpose within the meaning of the section of the National Prohibition Act above quoted. Not only were there no allegations of fact in the affidavit, but the affidavit merely alleged that the affiant had reasonable ground to believe and did believe that intoxicating liquors were being sold, manufactured, disposed of, or illegally possessed in the house of the defendant. In view of the use of the disjunctive "or," it did not even contain an unequivocal general allegation or conclusion which would warrant the issuance of the search warrant.

"It seems clear that the statute does not authorize the issuance of a search warrant for a dwelling house merely because it is being used for the manufacture of liquor. *Jozwich v. U. S.* (C. C. A.) 288 F. 881 (C. C. A. 7); *Singleton v. U. S.* (C. C. A.) 290 F. 130 (C. C. A. 9); *Voorhies v. U. S.* (C. C. A.) 299 U. S. 275 (C. C. A. 5). Cf. *Carroll v. U. S.*, 45 S. Ct. 280, 69 L. Ed. ——, March 2, 1925. Whether, if the evidence adduced were sufficient to indicate that the magnitude of the manufacture was of such a degree as fairly to necessitate the conclusion that the manufacture was but a step in the sale or marketing of the product, a search warrant could properly issue, we are not called upon to decide, inasmuch as no such evidence was adduced at the time the warrant was secured. It is not enough that facts as subsequently shown would have sufficed for the issuance of a warrant. Such facts must be alleged as a basis for the issuance of the search warrant to give the latter validity.

"Furthermore, although in fact the affidavit was made immediately after the facts were discovered, the affidavit itself is silent as to the time element. So far as the affidavit shows, the officer might have smelled the fumes months before the affidavit was made. See *Rupinski v. U. S.*, 4 F. (2d) 17 (C. C. A. 6), February 4, 1925. The officers had no probable cause to believe from the smell alone that the dwelling house was being used for sales. The situation did not justify a search without a warrant. The policy of the statute goes far to restrict the right of searching a dwelling even with a warrant. Such policy cannot be frittered away by granting a broader right of search without a warrant.

"The government attempts to justify the search on the ground that peace officers have the right to arrest and search a person committing a criminal offense in their presence. Leaving aside the question whether prohibition agents are peace officers (see *Brady v. U. S.*, 300 F. 540 [C. C. A. 6]; *Agnello v. U. S.*, 290 F.

671 [C. C. A. 2]), the offender was not in the presence of the officers, and there is no evidence that they had reason to suspect that he was. (*Temperani v. U. S.*, 299 F. 365 [C. C. A. 9]). Moreover, it may be questioned whether, in cases of misdemeanor, a peace officer or a private person has any power of arresting without a warrant, except when a breach of peace has been committed in his presence, or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence. *Wilgus, Arrest without Warrant*, 22 Mich. Law Rev. 541, 673, 798, especially 703-709. There is no evidence here of any breach of peace, existing or imminent, which would justify the exercise of powers sanctioned by the common law only in situations of emergency. See *Carroll v. U. S.*, supra. In *Agnello v. U. S.*, supra, *McBride v. U. S.* (C. C. A.) 284 F. 416 (C. C. A. 5), and *Garske v. U. S.* (C. C. A.) 1 F. (2d) 620, the search was justified as incidental to a lawful arrest."

#### MEETING OF THE DELAWARE STATE BAR ASSOCIATION

The annual meeting of the Delaware State Bar Association was held January 8th. Mr. Josiah Marvel, of Wilmington, has been President of the Association three years, and asked to be relieved, but his desires were unavailing, and he was re-elected for this year.

Mr. Charles C. Keedy, of Wilmington, was elected as Secretary; and Mr. Thomas C. Frame, Jr., of Dover, as Treasurer.

Widower with eight children marries widow with seven children.—News Item.

That's not a marriage—just a merger.

A well-known political leader in the Middle West completed a full course of study in veterinary surgery, but never practiced. He branched out into politics. During a campaign his political enemies referred to him with mingled sarcasm and scorn as "the Vet," and one day at a heated debate one of them asked, "Are you really a veterinary surgeon?" "Why do you ask?" queried the quick-witted politician. "Are you ill?"—Everybody's Magazine.

"Sedentary work," said the college lecturer, "tends to lessen the endurance."

"In other words," butted in the smart student, "the more one sits, the less one can stand."

"Exactly," retorted the lecturer, "and if one lies a great deal, one's standing is lost completely."—Christian Guardian.

## COMPULSORY BIBLE READING IN PUBLIC SCHOOLS

### Part I

BY ALBERT LEVITT

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**Introduction.**—At various times during the past seventy-five years efforts have been made by honest and zealous persons to introduce religious education into the public schools of the country. Since the World War the efforts have been particularly strenuous. In many of the States bills have been introduced in the legislatures making Bible reading a required feature of the conduct of the schools. Some of these bills have been enacted into law. The constitutionality of these acts has been sharply questioned from time to time. The courts have not been unanimous in their holdings. The problem is still, legally, somewhat of an open one.

A typical Bible reading bill is that which was introduced in the Virginia legislature two years ago. It failed of being enacted into law, but is to be reintroduced this year and stands some chance of becoming a law. As all discussion of religious freedom in the United States harks back to the Constitution of Virginia and the Virginia Statute guaranteeing religious freedom, the provisions of the Virginia law and the Bible reading bill are here presented.

The Virginia Constitution reads as follows:

"That religion or the duty we owe to our Creator, and the matter of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercises of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other."<sup>1</sup>

\* The substance of this article will appear as part of a chapter in a forthcoming book on "Criminal Law and Religious Freedom in the United States."

(1) Code of 1924, Sec. 16. Constitutional provisions in other states are similarly worded and convey the same notions. See for example, Ohio, Const. Art. 1, Sec. 7; Iowa, Const. Art. 1, par. 3;

In dealing with this section of the Constitution the Virginia courts have said that:

The Constitution "puts all religions on a footing of perfect equality; protecting all; imposing neither burdens nor civil incapacities upon any; conferring privileges upon none. . . . Proclaiming to all our citizens that henceforth their religious thoughts and conversations shall be as free as the air they breathe; that the law is of no sect in religion; has no high priest but justice. Declaring to the Christian and the Mohammedan, the Jew and the Gentile, the Epicurean and the Platonist (if any such there be amongst us), that so long as they keep within its pale, all are equally subjects of its protection; securing safety to the people, safety to religion; and (leaving reason free to combat error) securing purity of faith and practice far more effectively than by clothing the ministers of religion with exclusive temporal privileges; and exposing them to the corrupting influence of wealth and power."<sup>2</sup>

It follows, therefore, that there is no state religion in Virginia. All religious sects are equal before the law. Although Christianity is not deprecated it is not placed upon a higher *legal* plane than non-Christian faiths. Religious freedom is granted to all religionists upon equal terms.<sup>3</sup>

The Virginia Statute guaranteeing religious freedom is too long to set out in full.

Mich., Const. Secs. 39, 40, 47; Neb., Const. Art. 1, Sec. 4; Ill., Const. Art. 2, par. 3; La., Const. Arts. 4, 53; Wash., Const. Art. 1, Sec. 11; Ga., Civ. Code, 1910, Const. Art. 1, pars. 12, 13, 14; Calif., Const. Art. 1, par. 4, Art. 4, par. 30, Art. 9, par. 8.

(2) Perry's Case, 3 Gratt. 632 (1864). For a dictum dealing with this topic see Pirkey Bros. v. Commonwealth, 134 Va. 713 (1922). In this case a Sunday closing statute was upheld as a valid exercise of the police power. The constitutionality of the statute was not in question. But the court gave considerable space to the constitutional point connected with freedom of religion and stated that the provisions of the statute "cannot be enforced as a religious observance, as that is forbidden by our laws on the subject of religious freedom." This statement is made on page 717 and is repeated on page 722.

(3) This is in absolute accord with the interpretation of the Federal Constitution. Cooey in his famous book on Constitutional Limitations makes this clear and explicit. See Chapter XIII. "It is not mere toleration which is established in our system but religious equality." Ibid. p. 469. Mr. Justice Story has sometimes been quoted as though he was opposed to this idea. But a careful reading of his statements in their context makes it clear that although Christianity was not to be derogated, and was to be fostered, all men were to be free to worship as their consciences dictated and all possibility of religious strife was to be avoided. See Story on the Constitution, par. 1865 et seq.

The enacting part is as follows:

"II. Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."<sup>4</sup>

The Bible reading statute which was introduced in Virginia and failed of passage read as follows:

"Be it enacted by the General Assembly of Virginia, That every teacher in the public free schools below collegiate grade in this State be required to read daily, upon the opening of his class or school, at least five verses from the Holy Bible. Such teacher shall make no oral comment or written note pertaining to the passage so read. Any pupil may be excused from the class or class-room during such reading upon general written request of either parent or the guardian of such pupil."

This type of statute, or ordinance, or regulation, presents a problem which has been thoroughly considered by some of our courts.<sup>5</sup> The purpose of this article is to discuss the constitutionality of such a

(4) 12 Henning 24 (1785); Virginia Code 1924, Sec. 34. Section 35 (which was section 1395 of the Code of Virginia, 1887) states: "The General Assembly doth now again declare that the rights asserted in the said act (i.e., 12 Henning) are of the natural rights of mankind."

(5) The decided cases are not numerous. After diligent research the writer has been able to find only the following cases, which are given in chronological order: Donohue v. Richards, 61 Amr. Dec. 256 (Me. 1854); Spiller v. Woburn, 12 Allen 127 (Mass. 1866); Board of Education v. Minor, 23 Ohio St. 211 (1872); Moore v. Monroe, 20 N. W. 475 (Iowa 1884); State v. School Board, 44 N. W. 967 (Wis. 1890); Hysong v. Gallatin School Dist., 30 Atl. 482 (Pa. 1894); Pfeiffer v. Board of Education, 77 N. W. 250 (Mich. 1898); State v. Sheve, 93 N. W. 169 (Neb. 1903). See also, Ibid. 91 N. W. 846 (1902); Billiard v. Board of Education, 76 Pac. 422 (Kan. 1904); Hackett v. Brooksville School Dist., 87 S. W. 792 (Ky. 1905); O'Connor v. Hendrick, 77 N. E. 612 (N. Y. 1906); Church v. Bullock, 109 S. W. 115 (Tex. 1908); Comm. v. Herr, 78 Atl. 68 (Pa. 1910); Peo. v. Board of Education, 92 N. E. 251 (Ill. 1910); State v. Dilley, 145 N. W. 991 (Neb. 1914); Herold v. Parish Board, 68 So. 116 (La. 1915); State v. Dist. Board, 156 N. W. 477 (Wis. 1916); Knowlton v. Baumhower, 166 N. W. 262 (Iowa 1918); State v. Frazier, 173 Pac. 35 (Wash. 1919); Wilkerson v. City of Rome, 110 S. E. 895 (Ga. 1922); Evans v. School District, 222 Pac. 801 (Calif. 1924). I am not able, because of inadequate library facilities, to verify the dates of the following two cases: Stevenson v. Hanyon, 4 Pa. Dist. R. 395; McDowell v. Board of Education, 173 N. Y. S. 590.

statute from the point of view of constitutional guarantees of religious freedom.

*Is the Bible a Religious Book?*—At the very outset a definite problem is presented. Which Bible is meant by the phrase "Holy Bible"? The Jews have the Old Testament but reject the New Testament. The Mohammedans put their faith in the Koran. The Catholics insist that the Douay Bible is the only true Bible for their denomination to use. The Protestants hold to the King James Bible or to the American Revised Version. Among the Protestants, however, there are differences of opinion. The Lutherans still use Luther's Bible. The Mormons adhere to their New Dispensation. All of these religionists call their Bibles "Holy." In our own time new versions of the Old and New Testaments are being printed and used.<sup>6</sup> Do the legislating authorities who prescribe Bible reading in the public schools mean any or all of these Bibles? Sometimes they specifically designate the King James version as the one that should be read.<sup>7</sup> More often they do not. Where they do not is the choice of the Bible to be read to be left to the one doing the reading, to the school authorities, to the pupils, or to the parents of the children who are to read or be read to?

It is very probable that the legislating authorities intend that the King James Version of the Bible should be read. This for two reasons. Most of the legislators are members of some Protestant sect and are more familiar with the King James Version than with any other. It may be assumed that they intended to require the reading of that with which they are most familiar. This is the first reason. The second is that many of the legislators do not know that there is more than one Bible

(6) Moulton's Bible is used a great deal because of its literary arrangement. U. G. B. Pierce has a collection of extracts called "The Soul of the Bible," which is used almost exclusively by various clergymen. Recently a "Modern Bible" has been translated by a member of the faculty of a mid-western university. See Luccock, "The New Translations," XI Biblical Review 11 (1926, January).

(7) Evans v. School District, 222 P. 801; Wilkerson v. City of Rome, 110 S. E. 895.

in existence.<sup>8</sup> Where this is so it cannot be presumed that they intended to prescribe that with which they were not familiar and never themselves used.

As a corollary to this, as some courts have seen and held, the Bible which is meant and the Bible which will be used will depend on the sectarian complexion of the legislating authorities. A Catholic school board will prescribe the Catholic Bible, a Protestant school board the Protestant Bible, and so on.<sup>9</sup>

Assuming, as some of the legislating authorities do, that the "Holy Bible" means the King James or the Revised versions of the Bible, the question becomes this: Is the King James version of the Bible a book of religion? Which presents the prior question, What is religion? The answer to this question as given by the courts and text writers is not complete nor satisfactory.<sup>10</sup> This is because they have dealt with, but have not made clear, the three aspects of religion, and have not determined which of these three aspects the constitutional guarantees of religious freedom are supposed to protect. But they have decided that religion, whatever it may mean, must not be impeded, disparaged nor made the basis for discrimination nor the diminution of civil and political rights.

(i) The first aspect of religion is the *mystic* aspect. Human beings have the capacity of communing with, or coming into relation to, the spiritual forces of the universe. Out of this communion comes a

(8) This was brought out in the Tennessee Anti-Evolution case when the representative in the Legislature who had introduced the anti-evolution bill stated that he had not known that there was more than one Bible. See *The Nation* for August 5, 1925.

(9) *State v. Frazier*, 173 P. 35, 39.

(10) "Religion in the broadest sense comprehends all systems of belief in the existence of beings superior to and capable of exercising an influence for good or evil on the human race." *In re Knight* 28 Atl. 303. "In its primary sense it imports as applied to moral questions only a recognition of a conscientious duty to obey the restraining principles of conduct." *In re Hinckley*, 58 Calif. 457, 512. (Just what does this definition mean?) Religion is "a term said to refer to one's views of his obligations to his Creator and to the obligations they impose of reverence for His being and character and of obedience to His will; morality with a sanction drawn from a future state of rewards and punishments; some system of faith and practice resting on the idea of the existence of one God, the Creator and Ruler, to whom His creatures owe obedience and love. Any system of faith and worship." 34 Cyc. 1110.

feeling of utter security and peace, strength to carry on the daily tasks of living and courage to face whatever the future may hold in store. Through this communion experience men have come to a profound consciousness of the existence of a "power not ourselves" which they have reverently called God.<sup>11</sup> Religion is a communion experience of God.<sup>12</sup>

From this point of view there can be no doubt that the Bible is a book of religion. It contains the record of some of the sublimest and profoundest of religious experiences. Thousands of deeply devout and religious men and women have found in the Bible the chiefest aid to their communion experiences of God. To say that the Bible is not a book of religion is to state that which is patently untrue and to take from the Bible its tenderest and most potent attribute.<sup>13</sup>

(ii) The second aspect of religion is *intellectual*. Human beings are not content with emotional experiences. They have minds. They like to rationalize their experiences. They like to explain their feelings. They have an inner urge to systematize their emotions; to clarify them, to

(11) The writings of the Church Fathers abound with passages dealing with this mystic experience. Among the more modern writings see the works of Tauler, Boehme, and Fichte. Among the English Poets see the religious poems of Vaughan and Donne. The nature of the communion experience and its method of action has been variously described. The best study of the material is James, *Varieties of Religious Experience*. See also Jastrow, *Psychology of Religion*; and Starbuck, *Psychology of Religion*.

(12) "Religion has reference to man's relation to divinity; to the moral obligation of reverence and worship, obedience and submission. It is the recognition of God as an object of worship, love and obedience; right feeling toward God as highly reprehended." *People v. Board of Education*, 92 N. E. 251, 252.

(13) "The character of the book is that it is a pious one, and it is essentially religious. It is not adapted for use as a text book for the teaching alone of reading, history, or of literature, without regard to its religious character. Such use would be inconsistent with the true character and the reverence in which the scriptures are held and should be held." *Herold v. Parish Board*, 68 So. 116, 121. "The Bible is not read in the public schools as mere literature or as mere history. It cannot be separated from its character as an inspired book of religion." *People v. Board of Education*, 92 N. E. 251, 255. For a sweeping condemnation of the last cited case, see Schofield, 2 Essays on Constitutional Law and Equity, 459 et seq. The present writer submits that Prof. Schofield's article is full of logical and legal fallacies. His primary argument is that religious freedom in the United States is guaranteed only to Christians and not to non-Christians. This is totally at variance with the cases and with the statements of other reputable writers.

arrange them in some sort of an intellectual scheme. The intellectual systematization of religious experiences is theology. Religion is theology.<sup>14</sup>

It is obvious that, from this point of view, the Bible is a book of religion. It contains an immense amount of theology. It is an almost unlimited storehouse of information concerning the notions of the greatest religious thinkers concerning the nature, the attributes and the character of God. All the Christian sects since the death of Christ have turned to, and relied upon, proof texts in the Bible to establish and support their theological doctrines and systems. Theological differences between the very large number of Christian sects in this country grow out of the importance which is placed upon different texts in the Bible.<sup>15</sup> The Bible is the most important book of theology which Christians possess. In so far as theology is an aspect of religion the Bible is a religious book.

(iii) The third aspect of religion is *motor*. Religion impels people to action. The mystic experience is dynamic. It vivifies human lives. It stimulates the intellect and galvanizes theology. Religious people are not satisfied with feeling and thinking. They crave action. They wish to put their feelings and thought into conduct. Not only do they demand freedom to act as their feelings and ideas dictate but they

(14) "Theology, the science of 'religion'—that is of formulating our thinking with respect to religion—has steadily insisted upon connecting religion with the life men lead and the things they do in this world. Indeed the great religious struggles of the past have come in most cases from the undertaking of men to impose on other men, not their religion but their science of religion; and against this, rather than religion, as defined by the Attorney General, the law has interposed its shield of protection. When theologians formulate their conclusions, that anything such as a particular mode of life is essential to the attainment of the promised benefits of a religion, it is not for the courts by resorting to the definitions of lexicographers to perform the ungracious, if not the herculean task of determining whether this is so. The anticipated advantages of nearly every religion or creed are made dependent on the life its followers live, and the criticisms oftenest heard are that the exalted doctrines of righteousness professed are too frequently forgotten in the ordinary pursuits of life, and that the contests for wealth in some circles are waged with the rapacity of beasts of prey." State v. Amana Society, 109 N. W. 894, 898 (Iowa).

(15) "Courts take judicial notice of various Christian and non-Christian sects in the State, and that some or all have doctrinal differences and that they rely upon various proof-texts; that the Bible means the entire Bible; and that there are doctrinal passages in it about which the sects differ." State v. District Board, 44 N. W. 967, 972.

insist that certain types of conduct, of thought and of feeling be made the normal standards for judging the conduct, the ideas and the feelings of others. Religion is ethics and morals.<sup>16</sup>

There can be no questioning the fact that the Bible is a book of religion from this point of view. It contains many codes of morals, many systems of social conduct, which are set forth with authority as desirable, and even necessary, not only for life upon this earth but also for future salvation and life everlasting. Among these is the Sermon on the Mount, the noblest code of action yet revealed to mankind,<sup>17</sup> and various exhortations to ethical action by the prophets, saints and apostles. The Bible is a book of morals and ethics. For Christians and Jews it is the highest and most authoritative book of morals. In that far it is a book of religion.

In the light of the foregoing analysis it seems that the Bible is a religious book.<sup>18</sup>

*Does the Bible Contain Other Than Religious Material?*—Obviously it does. Various books and chapters in the Bible are devoted to history,<sup>19</sup> biography,<sup>20</sup> autobiography,<sup>21</sup> and love poetry.<sup>21a</sup> A great deal of the Bible is "literature," in the broad sense of the word.<sup>22</sup> It is, therefore, a matter of importance to determine whether the Bible is to be considered, in

(16) See note 10 supra, and note 14 supra. In the case last cited religion is patently discussed in its intellectual and motor aspects.

(17) "No more complete code of morals exists than is contained in the New Testament, which affirms and emphasizes the moral obligations laid down in the Ten Commandments," State v. School Board, 44 N. W. 967, 973.

(18) People v. Board of Education, 92 N. E. 251, 256, states: "The truths of the Bible are the truths of religion which do not come within the province of the public schools." Cf. Cases in note 13, supra.

(19) The Book of Kings and Book of Chronicles for example. "I am unable to see why extracts from the Bible should be proscribed when the youth are taught no better authenticated truths of history." Pfeiffer v. Board, 77 N. W. 250, 253.

(20) The Gospels of Matthew, Luke and Mark are biographies of Christ.

(21) The so called "We" section of the Book of Acts. Some parts of the Epistles of St. Paul.

(21a) Solomon's "Song of Songs."

(22) The sublimest poetry that has ever been written is found in the Book of Job and some of the Psalms. The Book of Job is also a wonderful drama. So is the Book of Esther. The Story of Ruth and Naomi is an exquisite idyll. For three hundred years the Bible has been the great example of "style." If the Bible is taken out of English literature a gap is made which nothing else can fill.

law, as an entirety, or whether it may be broken up into its component parts and each part considered in itself.

Those who believe that the Bible is Divinely inspired, that it is literally true, that no part of the Bible is more or less true than any other part, and that the entire Bible is literally the "infallible Word of God" take the position that the Bible is a unit and must be so considered. They claim, and from their point of view rightly, that what appear to be inaccuracies, inconsistencies, contradictions and impossibilities appear to be so only because of the defective and finite qualities of the human beings who read the Bible. God's Word, they claim, must be perfect and must be a self-consistent unit.

Some cases sustain this position. It has been held that the Bible is a unit, that it must be looked at in its entirety,<sup>23</sup> that Bible reading is the worship of God,<sup>24</sup> that the Bible is not read in the public schools as mere history or mere literature,<sup>25</sup> and that the Bible is not adapted for the teaching of secular subjects.<sup>25a</sup>

On the other hand there are those, and among them devout and earnest Christians, who maintain that the religious matter in the Bible can be separated from the secular matter. They contend that, as the Bible does contain history, literature, and codes of morals, the Bible can and should be used for the instruction of children in the public schools in those secular subjects.

Some courts have adopted this point of view. They have held that the Bible is a book of literature;<sup>26</sup> that literature may be read without inculcating religious principles;<sup>27</sup> that the Bible may be used to teach history;<sup>28</sup> that the Bible may be used as a

(23) *State v. School Board*, 44 N. W. 967, 972.

(24) *Harold v. Parish Board*, 68 Sou. 116, 121.

(25) *People v. Board of Education*, 92 S. E. 251, 255.

(25a) *Harold v. Parish Board*, 68 Sou. 116, 121.

(26) *State v. Sheve*, 93 N. W. 169. In this case the court held that any bible might be read as literature, and that literature might be read without inculcating religious ideas.

(27) *Ibid.*

(28) *State v. School Board*, 44 N. W. 967.

(29) *Ibid.*

text book in morals;<sup>29</sup> that the Bible may be used for instruction in reading;<sup>30</sup> and as a book of reference in the public school library.<sup>31</sup>

Other courts have held that although the entire Bible cannot be used for purposes of instructing the pupils in secular subjects, that extracts from the Bible do not fall within the ban.<sup>32</sup>

When courts are in disaccord an examination of the problem by reference to general principles is not invidious and may be helpful.

(a) One of the primary functions of the law, that is, the legal ordering of society, is the maintenance of the public peace. Whatever is likely to disturb the public peace is carefully watched and, if possible, controlled or curbed. When the public peace is disturbed the disturbers are handled in no uncertain fashion.

It is a matter of history and of common knowledge, and therefore, the courts will take judicial notice of it, that religious differences are insidious and potent factors of public unrest. Religious animosities are quickly aroused, swiftly develop into overt acts of antagonism, and rapidly lead to bitter factional disturbances and even to long and bloody wars. It was because of this tremendous potency of religious differences to create unrest, disturbance of the public peace, and bitter persecutions that there was placed in the Federal and the several State Constitutions the provisions guaranteeing religious freedom to all the inhabitants of this country. The spirit of these constitutional provisions and of statutes passed in furtherance of them will best be preserved if nothing is done by legislating bodies to arouse religious animosities, fears and disturbances. If a legislating body can achieve its purpose in a given matter without arousing religious antagonisms between the citizens it ought to take

(30) *Donahue v. Richards*, 61 American Decisions, 256.

(31) *Evans v. Selma Union High School District*, 222 P. 801, 802.

(32) *Pfeiffer v. Board*, 77 N. W. 250; *State v. Board*, 44 N. W. 967.

the way which does attain its object and still does not tend to arouse religious animosities.

(b) True it is, that it is not for the courts to determine matters of public policy, nor to declare a statute to be unconstitutional because they do not approve of the public policy followed by the legislators. But, if the situation presented to the courts contains elements upon which the courts can predicate the unconstitutionality of a statute, or an ordinance, they ought to declare the statute or ordinance unconstitutional. The fact that by a process of analysis, and careful elimination, some elements of constitutionality may be made to appear, should not lead the courts to pronounce in favor of constitutionality. The more so if by so doing they may follow the letter of the Constitution but really violate its spirit and purpose.

(c) The fact that there are those who look upon the Bible as an entirety, and as so completely and ineradicably saturated with religion that to deal with it in any secular way is to tarnish its honor and integrity, and that there are those, less literal minded, to whom the Bible is a composite work of religion, theology, ethics, history, and literature, is in itself a fact that leads to unrest, disturbance and animosities based upon the awakening of religious emotions, theological prejudices and moral antagonisms. To hold that the Bible is to be looked upon as an entirety would probably exactly follow the intent of the legislating body. To consider the Bible as being religious in its entirety, or, better still, to consider the Bible as having throughout its entirety religious and secular elements so commingled that only skilled scholars can separate the religious from the secular, and that it is not the function of the courts to divide or find divisible that which the legislating body intended to be looked upon as an entirety, would leave the right of the legislating body to determine public policies undisturbed. It would also protect the religious beliefs of those to whom the

Bible was a religious entity. And it would not interfere with the religious convictions of those who were less literal and more critical in their dealings with the Bible. For, if the Bible is to be looked on as a unit, and if it is a book of religion, either in whole or in part, as both sides would have to admit, and if the courts cannot settle which part is religious and which is not, and as religious teaching cannot be a part of the public school curricula (as we shall show later), the courts can fairly decide that compulsory Bible reading in the public schools is unconstitutional. In this way it will fulfil both the letter and the spirit of the Constitutions of the several states. If the intent of the legislating body was to deal with a part of the Bible when it used the phrase "Holy Bible" then it should have said so and indicated which part of the "Holy Bible" it meant. The rule that courts will construe a statute so as to find it constitutional if possible, does not compel the courts to find a statute constitutional when by so doing they violate the principle, the purpose and the spirit of the constitution. It is submitted, therefore, that the phrase "Holy Bible" should be interpreted as meaning the Bible as an entirety, and that it should be treated by the courts as a religious book in its entirety.

(d) Suppose, however, that the courts could find (though I know of no statute requiring Bible reading in the public schools which irresistibly calls for such a finding) that the legislating body did intend to make the phrase "Holy Bible" mean a part, or some parts, of the Bible and not the Bible in its entirety. Should the courts decide which parts the legislating body intended to incorporate in the state? Can the courts perform this service for the legislating body? It requires no argument whatever to establish a negative answer to these questions. It is enough to state that the courts have no legislative functions.

(e) Suppose, further, that the courts would be willing to assume the legislative

function. They would then have to decide as a matter of policy whether it is advisable to allow the Holy Bible to be read in the public schools. Obviously they could not, as a matter of policy, allow the religious parts of the Bible to be read. The Constitutional guarantees of religious freedom would negative that. At most only the secular portions of the Bible, if there are such, could be required in the public schools. Would it be good policy to do this when the secular portions are so interwoven with the religious that sensitive persons would be aroused to rebel against the proposed requirement? Particularly so when the secular parts can be put into the school curricula in other ways. For example: If the legislature desired to have the historical portions of the Bible read or taught in the public schools they could use histories of the Old Testament which have been written by learned and enthusiastic scholars. The same is true of Old Testament literature. Courses in morals and ethics can be given which would be based on Old and New Testament codes. It is not absolutely imperative that the Bible be used as a text book.

If the function of the constitutional provisions concerning religious freedom is to prevent religious persecution and theological strife and to keep both out of public institutions, and if the secular portions of the Bible which are of value for instructional purposes can be utilized without arousing religious animosities and dissensions, it would be better, it is submitted, to declare that the reading of the Bible is unconstitutional, and to leave the legislating body to attain its purpose in some other way.

It would follow, therefore, that the phrase "Holy Bible" means the Bible as an entirety, and that for constitutional purposes the entire Bible is a book of religion.

*Is Bible Reading Religious Instruction?* —No one would deny that reading is a method of study and a form of instruction.

It has, indeed, been said that reading is an important form of instruction.<sup>33</sup> It would follow, therefore, that, as the Bible is a book of religion, that reading the Bible is instruction in religion.<sup>34</sup> And, as a corollary, reading from the New Testament would be instruction in the Christian religion.<sup>35</sup> In that far at least Bible reading would be a discrimination against non-Christians.<sup>36</sup> And if the parts of the Bible which were read were those parts which Catholics could not accept as part of their religion the reading of the Bible would be a discrimination against Catholics. In this way it would seem that Bible reading would be not only religious instruction but also sectarian instruction.<sup>37</sup> That no comment of any sort is made upon the reading would be, it is submitted, immaterial. The lack of comment would prevent ambiguities and obscure passages from being clarified. It would be imperfect instruction; but, none the less it would still be instruction in religion.<sup>38</sup>

*Summary.*—It seems clear that the Bible is a book of religion, that reading the Bible

(33) Harold v. Parish Board, 68 Sou. 116; State v. School Board, 44 N. W. 957; People v. Board, 92 N. E. 251.

(34) *Ibid.*

(35) *Ibid.*

(36) *Ibid.* "The reading of the New Testament as the word of God infringes on the religious scruples of the Jews." *Harold v. Parish Board*, supra.

(37) *Ibid.* "That the reading from the Bible in the schools, although unaccompanied by any comment by the teacher is 'instruction' seems to us too clear for comment. Some of the most valuable instruction a person can receive may be derived from reading alone, without extrinsic aid by way of comment or exposition. The question then seems to narrow down to this: Is the reading of the Bible in the schools—not merely selected passages therefrom, but the whole of it—sectarian instruction of the pupils? In view of the fact already mentioned that the Bible contains numerous doctrinal passages upon some of which the peculiar creed of almost every religious sect is based and that such passages may reasonably be understood to inculcate the doctrines predicated upon them, an affirmative answer to the question seems unavoidable. Any pupil of ordinary intelligence who listens to the reading of the doctrinal portions of the Bible will be more or less instructed in the doctrines of the divinity of Jesus Christ, the eternal punishment of the wicked, the authority of the priesthood, the binding force and efficacy of the sacraments, and many other conflicting sectarian doctrines. . . . We do not know how to frame an argument in support of a proposition that the reading thereof in the district schools is not also sectarian instruction." *State v. Board*, 44 N. W. 957, 973.

(38) See the dissenting opinion in *Pfeiffer v. Board*, 77 N. W. 250, 257. Two cases squarely hold, however, that Bible reading is not sectarian instruction. See *Billiard v. Board of Education*, 78 P. 422 (Kan. 1904); and *Hackett v. Brooksville School District*, 87 S. W. 792 (Ky. 1905).

is sectarian religious instruction, and that requiring the reading of the Bible is requiring sectarian religious instruction.

Part II will follow in the next number of the Journal.—EDITOR.

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**AUTOMOBILES—ATTEMPT TO START WHILE INTOXICATED**

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**STATE v. JONES**

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130 Atl. 737

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(Supreme Judicial Court of Maine, Nov. 4, 1925)

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Indictment under Laws 1921, c. 211, § 74, for attempting while under influence of intoxicating liquor to operate an automobile on a public highway, an alleging act of attempting to start automobile, it follows ex vi termini that act was done with intent to commit an offense, and hence sufficient allegation that overt act was done with intent to commit principal offense.

Benjamin L. Berman, Co. Atty., and Elton H. Fales, Asst. Co. Atty., both of Lewiston, for the State.

Herbert E. Holmes, of Lewiston, for respondent.

**WILSON, C. J.** An indictment for attempting to operate an automobile on a public way under section 74 of chapter 211 of Laws of 1921.

The indictment sets out in general terms, according to the usual form for indictments for an attempt, that the respondent "did then and there attempt to commit an offense, to wit, the offense of then and there operating a motor vehicle, to wit, an automobile, on Water street," etc.

It then sets forth the overt acts constituting the attempt, in accordance with the form approved in *State v. Doran*, 99 Me. 331, 59 A. 440, 105 Am. St. Rep. 278 (also see *State v. Ames*, 64 Me. 386, 388; 2 Bishop, Crim. Proc. § 86, par. 2, § 92; Whitehouse & Hill, Crim. Proc. § 63), that the respondent "did then and there, in attempting to commit said offense, insert and turn the key of said automobile and put his foot upon the self-starter, thereby operating said self-starter, \* \* \* but was then and there interrupted and prevented from carrying said attempt into full execution."

To the indictment a demurrer was filed and overruled. The case comes to this court on exceptions to the overruling of the demurrer.

The ground of the exception is that the indictment does not sufficiently set forth the intent with which the alleged overt acts were

committed. It is true that, unless the alleged acts were done with the intent to operate the motor vehicle upon a public way, no offense was committed; but it is set forth that they were done while or "in attempting to commit said offense."

If done in attempting to commit the offense, it follows ex vi termini that they were done with the intent to commit the offense.

While not in commendable form, we think it is a sufficient allegation that the overt acts were done with the intent to commit the principal offense.

The mandate will be:

Exceptions overruled.

**NOTE.—Intoxicated Person Trying to Start Automobile, as Attempt to Commit Crime.**—The reported case is the first of the kind to come to notice. In *People v. Domagala*, 206 N. Y. Supp. 288, 98 C. L. J. 83, holds that starting motor for the purpose of putting automobile into motion, constitutes "operation of automobile," within a statute prohibiting operating of automobile while intoxicated. The fact that the automobile was not put in motion, because the motor was not powerful enough to force automobile over the curb without stalling, was no defense.

A note to the above case in 98 C. L. J. 84, covers the subject of "When Is an Automobile 'Operated'."

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**BOOK REVIEWS**

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**BALDWIN'S DOLLAR LAW DICTIONARY**

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The above entitled volume, published by The Baldwin Law Publishing Co., Cleveland, designed for the use of law students, probably contains more for the price than any other law book. It is A Concise Dictionary of Law; A Collection of Legal Maxims Translated; The Uniform Commercial Laws; Canons of Professional Ethics, and a table of Abbreviations of American and English Reports most frequently found in law books. The author is William Edward Baldwin, of the Cleveland Bar.

The book contains more than 350 pages, and is well and attractively bound in flexible fabrikoid.

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**FAMOUS AMERICAN JURY SPEECHES**

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West Publishing Company, St. Paul, have recently published a volume entitled as above. The addresses were made before juries and fact-finding tribunals, and were collected and edited by Frederick C. Hicks, Associate Professor of Legal Bibliography, and Law Librarian, Columbia University Law School.

The contents of the book are:

Joseph H. Choate—Argument in Equity for the Plaintiff in the Union Club Case, New York Supreme Court, New York, September, 1884.

Henry L. Burnett—Summation for the Defendant in the Page Case, Rutland County Court, Rutland, Vermont, May 7, 1885.

Joseph H. Choate—Argument in Admiralty for the "Republic" (steamship), United States District Court, New York, May 19, 1886.

Robert G. Ingersoll—Summation for the Contestants in the Davis Will Case, District Court, Butte, Montana, September 5, 1891.

Francis L. Wellman—Summation for the People in the Carlyle Harris Murder Trial, Court of General Sessions, New York City, February 8, 1896.

Delphin M. Delmas—Argument for the Petitioners in the Miller and Lux Case, Superior Court, Redwood City, California, December 9, 1896.

William E. Borah—Summation for the People in the Cœur d'Alene Riot Murder Trial, District Court, Wallace, Idaho, July 27, 1899.

Richard V. Lindabury—Argument for the Complainants on a Bill for Injunction in the Prudential-Fidelity Merger Case, New Jersey Court of Chancery, Jersey City, November 14, 1902.

Peter Francis Dunne—Summation for the Government in the San Francisco Mint Case, United States District Court, San Francisco, April 1 and 2, 1903.

Francis P. Garvan—Opening Address for the People in the Thaw Murder Trial, Criminal Branch, New York Supreme Court, New York City, February 4, 1907.

Walter G. Merritt—Summation for the Plaintiffs in the Danbury Hatters' Case, United States Circuit Court, Hartford, Connecticut, February 3, 1910.

Daniel Davenport—Summation for the Plaintiffs in the Danbury Hatters' Case, United States Circuit Court, Hartford, Connecticut, February 3, 1910.

Martin W. Littleton—Summation for the Respondent in the Investigation of Senator Jotham P. Allds by the New York State Senate, March 22, 1910.

James W. Osborne—Summation in Support of the Charges Preferred by Senator Benn Conger in the Investigation of Senator Jotham P. Allds by the New York State Senate, March 23, 1910.

Harvey D. Hinman—Opening Address for the Respondent in the Sulzer Impeachment Trial, Albany, New York, October 6, 1913.

Edgar T. Brackett—Summation for the Managers in the Sulzer Impeachment Trial, Albany, New York, October 10, 1913.

William M. Ivins—Opening Address for the Plaintiff in the Barnes-Roosevelt Libel Case, New York Supreme Court, Syracuse, New York, April 20, 1915.

William H. Van Benschoten—Opening Address for the Defendant in the Barnes-Roosevelt Libel Case, New York Supreme Court, Syracuse, New York, April 20, 1915.

John M. Bowers—Summation for the Defendant in the Barnes-Roosevelt Libel Case, New York Supreme Court, Syracuse, New York, May 19, 1915.

Morris Hillquit—Summation for the Socialists in the Investigation of the New York Socialists by the Assembly, Albany, March 3, 1920.

Martin Conboy—Summation for the Judiciary Committee in the Investigation of the New York Socialists by the Assembly, Albany, March 4, 1920.

Michael A. Romano—Summation for the People in the O'Shea Conspiracy Case, Criminal Court of Cook County, Chicago, Illinois, February 25, 1924.

Clarence S. Darrow—Closing Argument for the Defense in the Leopold-Loeb Murder Trial, Criminal Court of Cook County, Chicago, Illinois, August 22, 23 and 25, 1924.

Robert E. Crowe—Closing Argument for the Prosecution in the Leopold-Loeb Murder Trial, Criminal Court of Cook County, Chicago, Illinois, August 26, 27 and 28, 1924.

This volume will be of interest alike to lawyer and layman. It brings to the reader the best in American oratory, made realistic by the accompanying mental picture of the dramatic environment surrounding the speaker. It gives him the oratory of such men as Joseph Choate, Ingersoll, Borah, Merritt—the greatest of their day.

Skill in summing up cases is as necessary to the lawyer today as it ever was. It may even be contended that the complexity of modern cases calls for a higher order of skill than was formerly necessary. Whatever the case may be, it must always be analyzed and simplified, so that it may be clearly understood by the average man. Eloquence, moreover, if genuine and natural, is still useful.

The book contains more than 1100 pages, and is attractively bound in blue fabrikoid.

The railroad track supervisor received the following note from one of his track foremen:

"I'm sending in the accident report on Casey's foot when he struck it with the spike maul. Now under 'Remarks,' do you want mine or do you want Casey's?"

## DIGEST

### Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

Alabama	9, 52, 72, 86
Colorado	57, 91
Connecticut	24
Florida	54, 61, 87
Illinois	56, 96
Kansas	10, 82
Kentucky	19, 20, 30, 37, 40, 65
Louisiana	27, 59
Maine	6, 8, 50, 75
Massachusetts	4, 38, 41, 44
Minnesota	7, 58
Mississippi	26, 77, 78
Missouri	21, 22
Montana	71, 85
Nebraska	48
New Jersey	11, 43, 45
New Mexico	89
New York	15, 23, 25, 32, 81, 93
North Carolina	39, 60
North Dakota	36, 42
Ohio	35, 51
Oklahoma	16, 31, 68, 92, 94, 95
Rhode Island	62
South Carolina	84, 88
South Dakota	83
Texas	3, 64, 66
U. S. C. C. A.	46, 70, 80
U. S. D. C.	2, 12, 13, 14, 47, 49, 53, 73
U. S. S. C.	79, 90
Virginia	5, 28, 29
Washington	17, 34
West Virginia	33, 67, 69
Wisconsin	1, 18, 55, 63, 74, 76

1. **Animals—Injury by Led Horse.**—Driver of wagon, to rear of which three horses were attached by halters, held not negligent in proceeding along busy principal thoroughfare instead of crossing it at street from which he turned into it, so as to render owner liable for injuries to bicyclist kicked by one of such horses.—Kocha v. Union Transfer Co., Wis., 205 N. W. 923.

2. **Arrest—Search of Building.**—Person lawfully arrested may be searched for instruments, fruits, and evidences of crime, and, if taken in commission of crime in building, it may likewise be searched to extent that offender's control and activities likely extend.—United States v. Charles, U. S. D. C., 8 F. (2d) 302.

3. **Assignments—“Inheritance.”**—There being evidence that it was intention of husband, who deeded to his wife all his properties coming to him “from inheritance,” to convey all his property, whether obtained by devise or descent, “inheritance” will be construed to include property devised to husband by his mother.—Pacheco v. Fernandez, Tex., 277 S. W. 197.

4. **Attorney and Client—Settlement by Attorney.**—Agreement of plaintiff's counsel to accept less than full amount due held not binding on her unless she authorized such settlement.—Vaughn v. Robbins, Mass., 149 N. E. 677.

5. **Automobiles—Accident During Test.**—Relation of master and servant held not to exist between buyer of automobile and dealer while driving car to test it pursuant to warranty to keep it in repair for certain time, so that, for accident occurring while dealer was so driving car, the buyer was not liable.—Costan v. Smith, Va., 130 S. E. 235.

6. **Child as Servant of Parent.**—In action for damages from automobile collision, instruction that parent, owner of car, is liable, if, while riding with her minor daughter, she retained unrestricted right of direction and control of automobile, given as to impose liability without proof that daughter was acting in service of parent other than service of driving car, was proper under principle that, when one of two persons must suffer, it shall be he who is guilty of some fault, though slight, rather than one who is blameless.—Fuller v. Metcalfe, Me., 130 Atl. 875.

7. **Contributory Negligence.**—A seven-year-old boy rode his bicycle across a paved alley, and was injured by an automobile coming out of the alley. Immediately prior to the accident the boy rode the

bicycle on the sidewalk in violation of the city ordinance. Held that the boy was not guilty of contributory negligence as a matter of law, but that the facts presented a question for the jury.—Hackert v. Prescott, Minn., 205 N. W. 893.

8. **Duty of Guest.**—Guest of negligent driver, colliding with another negligent driver, defendant, held not guilty of contributory negligence in failing to warn driver of approach of defendant's car, where it appeared that by reason of trees obscuring vision she could not see defendant's car approaching until it was 20 feet away and the collision occurred almost simultaneously after she first saw it approaching.—Danksy v. Kotimaki, Me., 130 Atl. 871.

9. **Liability of Owner.**—The owner of an automobile is liable for resulting injuries to third person, if he intrusts it to one who, to his knowledge, is so incompetent in handling it as to convert it into a dangerous instrumentality.—Rush v. McDonnell, Ala., 106 So. 175.

10. **Liability of Owner.**—In an action against the owner of an automobile for damages resulting from an automobile collision, occasioned by the negligent operation of the trespassing car by another than the owner, proof of ownership does not make a *prima facie* case of liability, or raise a presumption of liability, on the part of the owner. Plaintiff must offer evidence that the driver was acting in some capacity for the owner, and within the scope of the employment.—Tice v. Crowder, Kan., 240 Pac. 964.

11. **Obscured Vision.**—Driver of vehicle must stop when his vision is entirely obscured by temporary obstruction such as dust cloud or smoke screen when failure to do so would jeopardize safety to others, and must remain at standstill until obstruction has come to an end.—Robinson v. Mutnick, N. J., 131 Atl. 67.

12. **Bankruptcy—Assignment.**—A contract by bankrupt to pay to a Board of Commerce of which it was a member “a commission of 50 per cent on all moneys received” from railroad companies for freight overcharges paid, as compensation to the board for its services in prosecuting the claims as agent of bankrupt, held not an equitable assignment of one-half the money paid by a railroad company to bankrupt's receiver on account of such claim, but to make the board only a general creditor of the bankrupt's estate.—In re George Walter Sons, U. S. D. C., 8 F. (2d) 267.

13. **Attorney for Creditors.**—In proceeding to review referee's order approving appointment of trustee by creditors, on ground that attorney of preferred creditor represented other creditors and acted in collusion with preferential creditors, it must be presumed, in absence of contrary showing, that he was employed in usual way by all creditors represented by him.—In re Day Lumber Co., U. S. C., 8 F. (2d) 146.

14. **Life Insurance Policies.**—The sale of a bankrupt's assets at private sale, ordered on petition of the trustee, describing the property, and on which the offer was based, held not to include life insurance policies, which were not scheduled, mentioned in the petition, nor known to the trustee or creditors, and which, if known, were not such property as would have been sold.—In re Butler Candy Co., U. S. D. C., 8 F. (2d) 311.

15. **Banks and Banking—Delivery of Bank Book.**—Where express company agreed to deposit named sum in foreign government postal savings bank, and to give depositor bank book in a few weeks thereafter, showing such deposit, failure to carry out agreement as to delivery of bank book, without good excuse therefor, held to entitle depositor to judgment for amount of deposit.—Auerbach v. Barrett, N. Y., 212 N. Y. S. 141.

16. **Liability of Stockholders.**—Where an action is instituted by the bank commissioner of the state to recover the double liability imposed by section 4122, Comp. St. 1921, as a general rule, all persons whose names are on the books of the bank, as the absolute owners of the stock, are liable as stockholders, and, if one knowingly permits his name to appear upon the stock book of the bank as a shareholder, he will be estopped from denying liability in an action brought to collect the double liability. This general rule does not apply, however, when the stock appearing in the name of the defendant is a part of a fictitious and invalid increase of the capital stock, which has been issued in violation of the provisions of section 39, article 9, of the Constitution, and sections 4118 and 5319, Comp. St. 1921.—State v. Zoll, Okla., 240 Pac. 1035.

**17. Bills and Notes—Acceleration of Due Date.**—Action on note, payable in installments on theory of acceleration of due date of whole indebtedness, because of default in payment of installment agreed to be paid, held not premature because holder failed to present note and demand payment at maker's place of business; there being no place for payment of note designated by its terms, where maker was furnished ample opportunity to make payment of installment at holder's place of business within a short distance from his own, and he failed to do so.—*Hartge v. Capelot*, Wash., 241 Pac. 5.

**18.—Consideration.**—Where brother of cashier of bank gave note to bank with understanding that note would be used for purpose of diminishing cashier's indebtedness and securing extension of payment for six months, such consideration is valid and sufficient to support action by bank, since it is not necessary that consideration move directly to maker of note, and that bank examiner finally ruled that note could not be counted in reducing cashier's indebtedness is immaterial.—*First Nat. Bank v. Pohland*, Wis., 206 N. W. 74.

**19.—Delay in Presenting.**—Under Negotiable Instrument Law (Ky. St. § 3720b186), as before enactment thereof, delay short of period prescribed by statute of limitations for action on check or original consideration in presenting it to drawee for payment does not release drawer from liability, unless he suffered loss or injury thereby, and then only pro tanto.—*Hazard Bank & Trust Co. v. Morgan*, Ky., 277 S. W. 307.

**20.—Holder in Due Course.**—Bank, accepting check payable to oil company nine months after date, is not a holder in due course, in view of Ky. St. 3720b53, providing that, where instrument payable on demand is negotiated an unreasonable length of time after issuance, the holder is not deemed a "holder in due course," and is therefore subject to defenses between original parties.—*Fayette Nat. Bank v. Meyers*, Ky., 277 S. W. 292.

**21. Carriers of Live Stock—Damages for Injury.**—Shippers of animals, sold at way point before shipment to destination, held entitled to recover difference between sale price and market value of entire shipment at destination in good condition, in absence of evidence that so many were uninjured as to necessitate separation of shipment and forwarding of uninjured animals.—*Morrow v. Wabash Ry. Co.*, Mo., 276 S. W. 1030.

**22.—Liability as Insurer.**—Even in cases of live animals transported in interstate commerce, plaintiffs may plead carrier's common-law liability as insurer and make out prima facie case by proving delivery to carrier in good condition and delivery by it in bad condition, whereupon burden is on carrier to show that loss or injury was caused in manner exonerating it from liability.—*Morrow v. Wabash Ry. Co.*, Mo., 276 S. W. 1030.

**23. Carriers of Passengers—Ownership of Street Cars.**—In action by passenger on trolley car for injuries, her testimony that defendant's name appeared on trolley car on which she suffered injury was sufficient to establish prima facie case in respect of ownership.—*Micklin v. Union Ry. Co. of New York City*, N. Y., 212 N. Y. S. 291.

**24. Contracts—Statement Under Signature.**—Where a contract of the parties contained a memorandum under the signature of the parties, and signed by one of them, the memorandum could be treated as surplusage, as not being a binding portion of the contract between the parties.—*Mazzlotti v. Di Martino*, Conn., 130 Atl. 844.

**25. Corporations—Election of Officers.**—Action by corporation, at request of directors and officers elected at annual meeting, to enjoin defendants, alleged to have been subsequently elected directors, held not to lie in equity, since controversy could not finally be determined without trying out title of directors as between contending factions.—*Merchants' Loan & Invest. Corp. v. Abramson*, N. Y., 212 N. Y. S. 193.

**26.—Liability of Stockholders.**—A stockholder of a corporation is not liable for the debts and liabilities of the corporation; and, where a corporation bottled drinks, a stockholder is not liable for damages resulting to buyers, where the stockholders did not participate in the actual bottling of the drinks.—*Graphic Bottling Co. v. Ennis*, Miss., 106 So. 97.

**27.—Mortgage—Stockholder, failing to establish conspiracy to give fraudulent mortgage on corporation property, or nonreceipt of sum of mortgage, held estopped to attack transaction as ultra vires.—*Viley v. Wall*, La., 105 So. 794.**

**28. Electricity—Assumption of Risk.**—Where invitee in coal mine did not know of risk from electric wire, he did not assume risk therefrom.—*Virginia Iron, Coal & Coke Co. v. Perkey's Adm'r*, Va., 130 S. E. 403.

**29.—Res Ipsa Loquitur.**—Doctrine of res ipsa loquitur does not apply when injury affecting hearing of telephone company's subscriber is due to defective electric appliance which is neither managed, operated, owned, nor controlled by telephone company.—*Gallagher v. Waynesboro Mut. Telephone Co.*, Va., 130 S. E. 232.

**30. Employers' Liability Act—Car Repairers.**—Evidence that railroad car repairers at time of injury to one of them were carrying a trestle to be placed under a loaded car is sufficient to show that they were engaged in commerce so as to come within Employers' Liability Act, which abolishes fellow servant doctrine as to carriers and employees engaged in intrastate commerce.—*Louisville & N. R. Co. v. Clark*, Ky., 277 S. W. 272.

**31. Explosives—Res Ipsa Loquitur.**—The rule of res ipsa loquitur is applicable to an accident resulting in injury to a stranger on his own premises from an explosion of nitroglycerine being transported by automobile truck along the road near his dwelling place. The explosion, and injury as the result, being proved, the presumption of negligence is indulged, and the burden, showing otherwise, shifts to the defendant.—*Selby v. Osage Torpedo Co.*, Okla., 241 Pac. 130.

**32. Good Will—Assisting Rival Business.**—Seller's covenant not to "in any manner whatsoever become interested directly or indirectly in any business," etc., is promise to refrain from injuring good will of business which was sold, and person so covenanting, who assisted his brother-in-law to establish business next door to that sold, by extending to him credit for merchandise, guaranteeing accounts for him, and so securing credit which had been denied, and actually advising choice of merchandise, and going with him and picking it out, violated such covenant.—*Amsterdam v. Marmon*, N. Y., 212 N. Y. S. 300.

**33. Hospitals—Liability for Physician's Negligence.**—A hospital conducted for private gain is liable to its patient for injuries sustained by him in consequence of incompetency or negligence of a physician treating him at its instance, under a contract to furnish him proper treatment.—*Vaughan v. Memorial Hospital*, W. Va., 130 S. E. 481.

**34. Innkeepers—Loss of Guest's Effects.**—In action by guest against hotel keeper for loss of goods by theft, a finding that plaintiffs were guilty of contributory negligence because money was left in trousers and rings on dresser held error; guests not being required to secrete valuables.—*Gillett v. Waldorf Hotel Co.*, Wash., 241 Pac. 14.

**35. Insurance—Autopsy.**—A clause in a policy of accident insurance gave the insurer the "right and opportunity to make an autopsy in case of death." When the death is known to an agent of the insurer a reasonable time before burial, who has justifiable grounds for entertaining the belief that such death was caused by other than accidental means, the demand for an autopsy, to be reasonable, must be made before burial.—*Gath v. Travelers' Ins. Co. of Hartford, Conn.*, Ohio, 149 N. E. 389.

**36.—Bank Cashier as Agent.**—Where the cashier of a bank is also the agent of an insurance company, and where, acting as such agent, he transmits to the company an application for insurance upon certain buildings, requesting the insertion of a loss payable clause in favor of the bank, a mortgagee of the buildings, he thereby transmits an application for a policy of insurance other than for himself, and is agent for the insurance company "to all intents and purposes," by virtue of section 4959 of the Compiled Laws for 1913.—*Michelsen v. North American Nat. Ins. Co.*, N. D., 206 N. W. 225.

**37.—"Conclusive Visible Evidence."**—Where burglary insurance policy provided there should be conclusive visible evidence upon premises at place of entry of force and violence used to effect entrance, the meaning of the term "conclusive visible evidence" should be determined by looking at whole policy and its evident purposes and ends to be attained.—*Husch Bros. v. Maryland Casualty Co.*, Ky., 276 S. W. 1083.

**38.—Declaration—Warranty clause in theft insurance policy to effect that automobile was not mortgaged or otherwise encumbered, "except as follows," held not declaration by assured; position**

of clause and fact that blank space was unfilled indicating that it was in form of question.—*Simpson v. Royal Ins. Co., Mass.*, 149 N. E. 665.

39.—Effective on Delivery of Policy.—Where policy provided that it did not take effect until delivery, while animal covered by policy was in good health and free from sickness or injury, recovery could not be had for death of mule two days before policy was delivered and before it was countersigned; the provision being a condition precedent.—*McCain v. Hartford Live Stock Ins. Co., N. C.*, 130 S. E. 186.

40.—Garnishment for Debt.—Proceeds of life insurance policies in hands of insurer held not subject to garnishment for debt of husband of insured, where he was not entitled to, nor could he, have enforced collection of policies in an action in his name, since beneficiary in each of them was the estate of his deceased wife; fact that he was member of class to whom payment might be made at option of insurer not enlarging his rights, but only permitting payment to be made to him in a representative capacity.—*Metropolitan Life Ins. Co. v. Hightower, Ky.*, 276 S. W. 1063.

41.—Liability for Judgments.—Under G. L. c. 175, §§ 112, 113, making insured's right to recover on indemnity policy from insurer independent of his satisfaction of judgments against him, insurer is not exposed to double liability, in view of chapter 214, § 3, cl. 10, and chapter 246, § 33.—*Lunt v. Aetna Life Ins. Co., Mass.*, 149 N. E. 660.

42.—Misrepresentation.—A clause in a fire insurance policy providing that the entire policy shall be void if the insured had concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, either before or after loss, is a valid and enforceable provision, but such matter must be material, made knowingly, and for the purpose of deceiving and defrauding the insurance company.—*Diehl v. Grant Farmers' Mut. Fire & Lightning Ins. Co., N. D.*, 205 N. W. 672.

43.—"Nudum Pactum."—Retention of premiums by insurance company, with knowledge that policy ordered was not policy issued, estops company from asserting defense of "nudum pactum" after loss.—*Sardo v. Fidelity & Deposit Co., N. J.*, 131 Atl. 73.

44.—Proof of Loss.—Reliance by insured on statements made by insurer's attorney that result of examination would be written out, and he would write insured to come down and swear to it, held insufficient to allow insured to disregard provision of policy as to written proof of loss within 60 days.—*Paulauskas v. Firemen's Fund Ins. Co., Mass.*, 149 N. E. 668.

45.—Reformation.—Where policy ordered was to cover money and jewelry, but policy delivered covered money and securities, failure of ignorant insured to discover that jewelry was not insured in his reading of the policy was not fatal to a reformation of the policy.—*Sardo v. Fidelity & Deposit Co., N. J.*, 131 Atl. 73.

46.—Safe Burglary.—Loss effected by opening door of safe by manipulating lock alone during policy period, after employment of force or violence before policy period to remove plug from hole in safe door, held not within policy of indemnity against loss occurring within policy period by burglary of safe by actual force and violence.—*Fidelity & Deposit Co. v. Spokane Interstate Fair Ass'n, U. S. C. A.*, 8 F. (2d) 224.

47.—Suicide.—Where provision of insurance policy declared that self-destruction within year from date of policy was risk not assumed, one year contestable clause did not require that claim of nonliability should be made within year from date of policy, but only that suicide occur within that time to relieve insurer from liability.—*Hearin v. Standard Life Ins. Co., U. S. D. C.*, 8 F. (2d) 202.

48.—Valued Policy.—Provisions of Valued Policy Law (Comp. St. 1922, § 7809), in view of judicial construction given it prior to enactment of insurance code of 1913 (Laws 1913, c. 154), are unmodified by Comp. St. § 7836, requiring fire insurance to be issued on form prescribed by department of trade and commerce as nearly as practicable in form known as New York standard, and provisions of insurance policy providing for replacement or rebuilding at option of insurer, as applied to cases of total loss, are repugnant to section 7809, and

afford no basis for defense by insurer sued on policy.—*Fadanelli v. National Security Fire Ins. Co., Neb.*, 205 N. W. 642.

49.—Interstate Commerce—Clearing Debris.—Plaintiff's intestate, engaged in clearing up debris prior to completion of stairway to be built through a tube for use in permitting passengers or employees of railroad to reach street, held not engaged in "interstate commerce"; stairway before completion and employment for purpose intended being not connected with interstate commerce.—*Clemence v. Hudson & M. R. Co., U. S. D. C.*, 8 F. (2d) 317.

50.—Injury to Switchman.—Where a train, in switching which switchman was employed when injured, had interstate character when it came into switching yard, it retained it to the time when all cars had been distributed to their appropriate places, and, where such disassociation had not been effected at time of plaintiff's injury, injury was caused while plaintiff was engaged in interstate commerce.—*Hatch v. Portland Terminal Co., Me.*, 131 Atl. 5.

51.—Motor Transportation.—Sections 614-86 to 614-102, inclusive, of the General Code of Ohio, are designed to regulate motor transportation governing all motor vehicles operating over the highways of the state, but do not authorize the Public Utilities Commission to exclude motor transportation companies operating in interstate traffic from such highways.—*Cannon Ball Transp. Co. v. Public Utilities Commission, Ohio*, 149 N. E. 713.

52.—Police Power.—Fact that act of Legislature forbidding entry of article into internal commerce of state tends to reduce movement of article into state through channels of interstate commerce, thus indirectly restricting such commerce, does not deprive state of police power to protect its inhabitants by legislation of such character.—*Gibson v. State, Ala.*, 106 So. 231.

53.—Intoxicating Liquors—Search for Narcotics.—Seizure of liquor, found by narcotic officer during bona fide search of hotel for narcotics, after arrest of proprietor, held lawful and liquor so seized admissible in evidence.—*United States v. Charles, U. S. D. C.*, 8 F. (2d) 302.

54.—Joint Stock Companies and Business Trusts—Common Law Trust.—An agreement between two or more persons, joint owners or owners in common of real and personal properties, or of either character of property, by which one or more of such persons are designated as so-called "trustees" for themselves and their associates, to manage, sell, dispose of, reinvest, and otherwise trade in or with such fund, which consists of such common properties, constitutes a partnership or joint stock company, in which the members who possess contractual capacity are severally liable, and all are necessary parties to any litigation growing out of such agreement and affecting such properties.—*Wiley v. W. J. Hoggon Corporation, Fla.*, 106 So. 408.

55.—Livery Stable and Garage Keepers—Contributory Negligence.—Where plaintiff, a total stranger to entrance to a garage, which entrance was unlighted and night was dark, crossed threshold while in great haste to obtain parts necessary to repair his broken down automobile before garage closed, and fell down stairs and was injured, held that he was guilty of contributory negligence as a matter of law.—*Du Rocher v. Teutonia Motor Car Co., Wis.*, 205 N. W. 921.

56.—Master and Servant—Chauffeur of Hired Automobile.—Chauffeur in general employ of one engaged in business of letting automobiles for hire held not employee of hirer at time of injury to one riding in hired car on hirer's invitation, though hirer had power to direct drivers of cars furnished him when and where to go, whom to haul, and routes to be taken, and could refuse to use cars and send them back with drivers; he having no authority to discharge chauffeur, nor any control over latter as to manner of driving car.—*Densby v. Bartlett, Ill.*, 149 N. E. 591.

57.—Monopolies—Marketing Contract.—Marketing contract, executed under Laws 1923, p. 420, by which defendant agreed to sell his potatoes to plaintiff only, held not invalid as being in restraint of trade under Colorado Anti-Trust Law, since the former statute, being the later act, controls the earlier.—*Rifle Potato Growers' Co-Op. Ass'n v. Smith, Col.*, 240 Pac. 937.

58.—Municipal Corporations—Injury by Machinery on Street.—Defendants were operating a well-drilling outfit upon a public street. The power was

furnished by a gasoline engine, and transmitted by an ordinary drive belt. An 11-year-old child, with the knowledge of defendants, was playing about the machinery in the presence of an obvious danger. Defendants did nothing to warn him of such danger. The child came in contact with the drive belt, and was injured. Held that the complaint does not state facts sufficient to state a cause of action upon the theory of the turntable doctrine because: (a) The instrumentality was not of such character as to amount to an invitation. (b) The danger was patent and not latent. (c) The characteristics of the agency and its general and common use render it impractical and unreasonable to fence or guard by inclosure.—*Erickson v. Minneapolis, St. P. & S. M. Ry. Co., Minn.*, 205 N.W. 889.

59.—Oil Stations a Nuisance.—Ordinance removing oil stations from a certain street, which oil stations constituted a nuisance in fact, held valid as an exercise of police power in interest of public safety, comfort, and welfare.—*State v. McShane, La.*, 106 So. 252.

60.—Water Supply.—A city, in absence of statute to contrary, does not, by building and operating a system of waterworks or by maintaining a fire department, enter into any contract with, or assume any implied liability to owners of, property to furnish means or water for extinguishment of fires, and for breach of which an action in damages may be maintained.—*Mabe v. City of Winston-Salem, N. C.*, 130 S. E. 169.

61.—Zoning Ordinance.—No express authority having been given the municipality to pass an ordinance forbidding permits for the erection of a building "to be used for any purpose other than that of a residence, except," etc., the nature of the regulation contained in the ordinance does not warrant a judicial holding that power to pass the ordinance is included in or may fairly be inferred from the general welfare or other powers expressly conferred.—*State v. Fowler, Fla.*, 105 So. 733.

62.—Zoning Ordinance.—Where a party possessed land which under Building Ordinance, section 28, defining "lot" as a parcel of land for one building, and section 11, providing areas for buildings, was sufficient to erect eight-family dwelling on corner lot and one-family dwelling on adjoining lot, and there was, prior to ordinance, a six-family house on adjoining lot, the building of a three-family house on corner lot was proper.—*Richard v. Zoning Board of Review, R. I.*, 130 Atl. 802.

63.—Negligence—Hose Across Sidewalk.—Finding that pedestrian, falling over hose stretched across sidewalk in daytime, was not guilty of contributory negligence, held warranted, where she was looking for house on opposite side of street and was trying to distinguish numbers thereon.—*Smith v. Clayton Const. Co., Wis.*, 206 N. W. 67.

64.—Oil and Gas—Cancellation of Lease.—Grantee of premises subject to oil and gas lease, to whom lessor relinquished royalty interest in tract conveyed, held entitled to cancellation of lease, where lessee disavowed original contract by making a supplemental lease and undertook to force grantee into making a new and more onerous agreement, thereby repudiating original lease, notwithstanding provision in supplemental lease that terms of original lease should remain in force subject to conditions in later instrument.—*Stephenson v. Glass, Tex.*, 276 S. W. 1110.

65.—Consideration for Lease.—A consideration of \$1 held sufficient to support an oil and gas lease by terms of which lessee's interest was subject to defeasance for failure to drill wells, though lessee might surrender lease to lessors upon payment of the \$1; "consideration" being defined as consisting of anything of any value.—*Union Gas & Oil Co. v. Wiedemann Oil Co., Ky.*, 277 S. W. 323.

66.—Forfeiture of Lease.—Where contract did not expressly provide for forfeiture of oil and gas lease, equity would not decree a forfeiture on breach of an implied covenant in such contract.—*Stephenson v. Glass, Tex.*, 276 S. W. 1110.

67.—Forfeiture of Vested Estate.—Equity will not enforce the forfeiture of a vested estate for a failure to pay rent. The lessor must resort to his legal remedy.—*Engel v. Eastern Oil Co., W. Va.*, 130 S. E. 491.

68.—Lien for Labor.—Where a person is employed by a contractor through his agent or his subcontractor to haul machinery from one point off a leasehold for oil and gas purposes, onto the leasehold, which machinery is to be used for the development of said property for oil and gas purposes, and the price agreed upon is not paid, the

person who performs such labor is entitled to a lien therefor, not only upon the leasehold, but upon the machinery, equipment, etc., located thereon; and where the owner of such machinery permits a contractor or his subcontractor or agent to deal with such machinery by employing another to haul the same as if it belonged to the contractor, his agent or subcontractor, as herein above indicated, and the hauling is done as per the contract, and the real owner thereof does not put the person doing the hauling on notice of his ownership thereof, he will not be permitted to set up his ownership, for the purpose of depriving the laborer of the lien granted him by said sections 7464 and 7466.—*Commercial Oil Corporation v. Lumpkin, Okla.*, 241 Pac. 137.

69.—Parol Lease.—Party in possession of oil-producing property conducting operations thereon presumed parol lessee where no evidence of lease; parol lease of oil properties, together with possession and royalty payments, creates valid year to year tenancy requiring statutory termination.—*Drake v. O'Brien, W. Va.*, 130 S. E. 276.

70.—Reasonable Development.—Under an oil and gas lease covering 900 acres in wildcat territory for a term of five years, renewable "as long as oil and gas is found," providing for delivery of royalty from the oil and that, if gas was found in paying quantities, lessee should pay \$100 each year for the product of each well while the same was being sold off the premises, lessee drilled two wells within the five years, each of which produced gas in considerable quantity, but without sufficient pressure to enable it to be marketed off the premises. Held that, continuing the lease as authorizing an extension if oil "or" gas was found in paying quantities, the drilling of two wells in five years on so large a tract, and from which lessor derived no revenue, was not a reasonable development, which entitled lessee to an extension.—*White v. Green River Gas Co., U. S. C. C. A.*, 8 F. (2d) 261.

71.—Royalties.—Where, under contract entitling plaintiff and associates to payment by defendant of 33 1/3 per cent of net proceeds of oil property, net proceeds taxes were treated and deducted as part of expense incident to operations, and defendant took over the contract completely, as authorized by Rev. Codes 1921, § 7413, by new contract whereby defendant agreed to pay in cash "20 per cent of the value of all oil or gas \*\*\* produced, saved, and marketed," held that, thereafter plaintiff and associates were entitled to payment of the 20 per cent royalty without deduction for net proceeds taxes paid.—*Forbes v. Mid-Northern Oil Co., Mont.*, 240 Pac. 818.

72.—Physicians and Surgeons—Certificate of Qualification.—Counts of indictment charging that defendant treated or offered to treat human diseases by "a system known as chiropractic," practiced "by men known as chiropractors," without having obtained certificate of qualification from state board of medical examiners, held not demurrable, as not sufficiently describing such system, or what is done by chiropractors, nor averring that it is unknown; statute being designed to prevent treatment of diseases by any system without having obtained such certificate.—*Robinson v. State, Ala.*, 106 So. 53.

73.—Qualifications.—Legislative requirement of high school education or its equivalent and of residence course of three seasons, consisting of 36 weeks each, in a school of approved standing, as prerequisite to right to practice drugless healing, fixed by Sess. Laws Wash. 1925, p. 23, held not unreasonable or arbitrary.—*Butcher v. Maybury, U. S. D. C.*, 8 F. (2d) 155.

74.—Public Utilities—Declaration of Legislature.—Legislature cannot arbitrarily declare a corporation a public utility which in fact inherently is not so.—*Chippewa Power Co. v. Railroad Commission, Wis.*, 205 N. W. 900.

75.—Railroads—Duty of Employee.—Terminal company's section hand, standing between rails, or, at all events, so near as to be within reach of defendant's on-coming train's ordinary and standard overhang, was presumptively negligent.—*Haarland v. Maine Cent. R. Co., Me.*, 130 Atl. 865.

76.—Locomotive Cab Curtains.—Laws 1923, c. 139, and order of Railroad Commission pursuant thereto, requiring railroads within the state to equip their locomotives with certain cab curtains, held not invalid as imposing undue burden on interstate commerce, since it is a law which the state has plenary power to pass in interest of public health.—*Chicago & N. W. Ry. Co. v. Railroad Commission, Wis.*, 205 N. W. 382.

**77. Sales—Implied Warranty.**—Under section 1386, Code of 1906 (Hemingway's Code, § 1102), a person who buys a drink on Sunday, being in part delicto of the seller, is not entitled to recover against the manufacturer on the theory of implied warranty of the wholesomeness of said drink.—*Grapico Bottling Co. v. Ennis*, Miss., 106 So. 97.

**78.—Upkeep of Car for Business Use.**—Plaintiff, directed by defendants to supply the car of H. with oil and gasoline during the progress of their construction, which H. was to supervise, was not required to see that H. did not, during such period, use the car with such supplies for other purposes also.—*Yates v. Houston & Murray*, Miss., 106 So. 110.

**79. Seamen—Treatment of Diseased Alien Seaman.**—Act Dec. 26, 1920, providing for treatment of alien seamen found to be diseased on arrival in ports of the United States, at expense of owner or master of vessel on which they arrive, when construed as applicable to American vessel bringing in a diseased alien seaman, is not repugnant to Const. U. S. Amend. 5, as imposing liability without causation or causal connection.—United States v. New York & Cuba Mail S. S. Co., U. S. S. C., 46 Sup. Ct. 114.

**80. Searches and Seizures—Warrant.**—Where prohibition agent saw automobile laden with liquor drive into garage disconnected from dwelling house, search of garage on same day, and seizure of liquor found in cars therein, held not unreasonable, regardless of validity of search warrant.—*Gay v. United States*, U. S. S. C. A., 8 F. (2d) 219.

**81. Taxation—Educational Institutions.**—In view of Tax Law, § 4, subd. 7, as amended by Laws 1924, c. 489, exempting universities and colleges, dormitories, dining halls, hospitals, training schools, supply stores, and athletic fields, used not as sources of institutional income, are essential parts of universities and colleges; "education" contemplating physical training, welfare, and proper maintenance of attendance.—*In re Syracuse University*, N. Y., 213 N. Y. S. 253.

**82.—Royalties from Oil.**—By virtue of R. S. 79-329, 79-330, and 79-331, overriding royalties, carved out of the working interest created by an oil lease, are taxable to the owners of such royalties.—*Robinson v. Jones*, Kan., 240 Pac. 957.

**83.—Selling Gasoline.**—Under Const. art. 11, § 2, state may not levy and collect taxes to conduct business of selling gasoline under Laws 1925, c. 184, as gasoline is not a natural resource of state, and business of buying and selling it is not within Const. art. 13, § 1, authorizing state to own and conduct proper business enterprises to develop resources and improve economic facilities of state, though gasoline may be used in development of state's resources.—*White Eagle Oil & Refining Co. v. Gunderson*, S. D., 205 N. W. 614.

**84. Telegraphs and Telephones—Error in Quotation.**—Where sweet potatoes, quoted at \$2.75 per cwt. when shipped, were rejected because telegram containing quotation when delivered read \$2.25 per cwt., held neither buyer nor seller was compelled to meet terms as understood by the other, and seller who, under mistaken belief that he was bound by telegram as transmitted, agreed to accept lower price, was not entitled to recover amount of loss from telegraph company, in absence of effort to make sale elsewhere.—*Harper v. Western Union Telegraph Co.*, S. C., 130 S. E. 119.

**85. Trespass—Shooting Over Premises.**—It being matter of common knowledge that shotgun is a firearm of short range, defendant, by standing on land of another and firing a shotgun over plaintiff's premises, dwelling, and cattle, thereby committed technical trespass at least.—*Herrin v. Sutherland*, Mont., 241 Pac. 328.

**86. Trover and Conversion—Mistake in Delivery.**—If defendant, knowing goods delivered to him by plaintiff were not his, wrongfully converted them to his own use, although such goods had been delivered to him under the mistaken belief that they were his, such act would constitute a conversion.—*Cotton v. Harris Transfer & Warehouse Co.*, Ala., 106 So. 220.

**87. Trusts—Dual Capacity.**—No person can be both trustee and cestui que trust of property at the same time.—*Willey v. W. J. Hoggson Corporation*, Fla., 106 So. 408.

**88.—Reasonable Rental.**—Trustee, required to use reasonable care and precautions to protect interests of beneficiary, though not liable for mis-

takes in judgment, held liable for failure to procure reasonable rental for property belonging to estate.—*Neely v. People's Bank*, S. C., 130 S. E. 550.

**89. Vendor and Purchaser—Representations.**—A contract of sale of ranches and live stock specified among the properties to be conveyed "250 miles of wire fence wherever situated." Proof merely that there was only 50 miles of fence, and that the vendee had, after taking possession, constructed certain 4-wire fence at a cost of \$200 per mile, was insufficient to warrant substantial damages.—*State Trust & Savings Bank v. Hermosa Land & Cattle Co.*, N. M., 240 Pac. 469.

**90. War—Suit Against Alien Property Custodian.**—Under Trading with the Enemy Act, § 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 315½aa), and section 9, as amended by Act June 5, 1920, and Act March 4, 1923, § 1 (Comp. St. Supp. 1925, § 315½e), and in view of Treaty with Germany Aug. 25, 1921, present German Government has no interest in or right to defend funds of Imperial German Government seized by Alien Property Custodian and held by Treasurer of the United States, and is not a necessary party to suit by holders of notes given by Imperial German Government to enforce payment from funds, nor has the United States in such act reserved to itself any preference or superior lien entitling it in such action to insist on satisfaction of its claims ahead of those of others.—*White v. Mechanics' Securities Corporation*, U. S. S. C., 46 Sup. Ct. 116.

**91. Work and Labor—Architect's Plans.**—Where before bond election, school board contracted with architects for plans, and after election made use of plans and advice of architects, circumstances are such that independently of lawful express contract or of authority of board to make contract, school district was liable on quantum meruit as to benefits received.—*Mountjoy & Frewen v. Cheyenne County High School Dist.*, Col., 340 Pac. 464.

**92. Workmen's Compensation—Arising Out of Employment.**—Where the injury suffered was the result of a fall caused by an attack of epilepsy, such injury is not one arising out of the employment, and not compensable under the Workmen's Compensation Law (Comp. St. 1921, § 7284, subd. 7).—*Marion Machine Foundry & Supply Co. v. Redd*, Okla., 241 Pac. 175.

**93.—Death From Gas.**—Death of garage workman from inhalation of carbon monoxide gas, generated by gasoline burning in motor car in garage, was from "accidental injury" "arising out of employment," within Workmen's Compensation Law.—*Cantor v. Elsmere Garage*, N. Y., 212 N. Y. S. 327.

**94.—Hazardous Employment.**—A workman was injured while capping a bottle of soft drink by means of machinery operated by foot pedal. He had filled such bottle by means of power driven machinery operated in the same enclosure. Held that such workman was engaged in "hazardous employment," as defined by the Workmen's Compensation Act, at the time of his injury, since the power driven machinery employed was incidental, if not necessary, to the process of making the drink, under paragraph 11 of section 7284, C. O. S. 1921, of said act, amended by Laws 1923, c. 61, § 2.—*Teague v. State Industrial Commission*, Okla., 240 Pac. 1063.

**95.—Nervous Breakdown.**—Where, as the approximate result of an accidental personal injury sustained by an employee arising out of and in the course of his employment, such employee, after all objective and subjective symptoms of actual physical injury are removed, suffers from a nervous breakdown and a neurotic condition ensues attributable to such injury which precludes the employee from resuming his work in his former occupation, such mental condition is an injury arising out of and in the course of his employment and is compensable under the provisions of the Workmen's Compensation Act.—*Rialto Lead & Zinc Co. v. State Industrial Commission*, Okla., 240 Pac. 36.

**96.—"Employee."**—Injuries of one hired to assist in removal of a barn, whose employment was temporary and work he performed was outside of usual or regular course of employer's business, held not compensable, under Workmen's Compensation Act, in view of section 5, subd. 2 (Smith-Hurd Rev. St. 1923, c. 43, § 142), excluding from definition of term "employee" any person not engaged in usual course of trade, business, profession, or occupation of his employer.—*H. Roy Berry Co. v. Industrial Commission*, Ill., 149 N. E. 278.